RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR 17 2016
OFFICE OF THE CLERK

No. 15-457

In the
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,
v.
SETH BAKER, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

LAURA E. PROCTOR
President of DRI— The Voice of the Defense Bar
55 W. Monroe St.
Suite 2000
CHICAGO, IL 60603

MARY MASSARON
Counsel of Record
HILARY A. BALLENTINE
PLUNKETT COONEY
38505 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4000
mmassaron@plunkettcooney.com

Counsel for Amicus Curiae DRI – The Voice of the Defense Bar

March 17, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I A Tactic That Allows Plaintiffs To Manufacture Interlocutory Appellate Jurisdiction To Obtain Review Of A Class-Certification Denial - And To Do So By Employing Voluntary Dismissal Tactics Without Consequence – Ignores The Effect Of A Dismissal With Prejudice, Runs Directly Afoul Of The Discretion Given To The Appellate Courts To Hear Interlocutory Certification Appeals, And Distorts The Balance Of The Civil Justice System. 6

A. When A Plaintiff Makes The Strategic Decision To Voluntarily Dismiss Part Or All Of His Claims With Prejudice In Order To Achieve Finality And Take An Immediate Appeal, He Cannot Revive The Dismissed Claims. 6

B. The Ninth Circuit's Decision Inures Only To The Benefit Of Class Plaintiffs, Thus Distorting The Balance Of The Civil Justice System And Placing Unfair Pressures On Defendants. 12

C. The Discretion To Immediately Review A Non-Final Certification Decision Belongs To The Appellate Courts, Not Class Plaintiffs. 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Air Wisconsin Airlines Corp. v. Hoeper,
134 S. Ct. 852 (2014) 1

Alamance Indus., Inc. v. Filene's,
291 F.2d 142 (1st Cir. 1961) 17

Baker v. Microsoft Corp.,
797 F.3d 607 (9th Cir. 2015) 21, 22

Baltimore Contractors v. Bodinger,
348 U.S. 176 (1955), *overruled other gds*,
Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 20

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 21

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 6, 10

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 1

Catlin v. United States,
324 U.S. 229, 233 (1945) 17

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005) 5, 20

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949) 11

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 1

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 4, 12, 18, 19, 20, 21

Dalton v. Lee Publications, Inc.,
625 F.3d 1220 (9th Cir. 2010) 2

Dannenberg v. Software Toolworks,
16 F.3d 1073 (9th Cir. 1994)..... 6

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974)..... 16, 18

Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.,
814 F.2d 90 (2d Cir. 1987)..... 8, 9

Fairley v. Andrews,
578 F.3d 518 (7th Cir. 2009)..... 6, 8

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368 (1981)..... 18

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988)..... 20

Heimeshoff v. Hartford Life Acc. Ins. Co.,
134 S. Ct. 604 (2013)..... 1

International Marketing, Ltd. v. Archer-Daniels-Midland Co.,
192 F.3d 724 (7th Cir. 1999)..... 7

Matter of Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995)..... 15, 16

Parkinson v. April Industries, Inc.,
520 F.2d 650 (2d Cir. 1975)..... 21

Parko v. Shell Oil Co.,
739 F.3d 1083 (7th Cir. 2014)..... 14

Thorogood v. Sears, Roebuck and Co.,
547 F.3d 742 (7th Cir. 2008)..... 15

U.S. v. Windsor,
133 S. Ct. 2675 (2013)..... 7

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 1

Court Rules

Federal Rule of Civil Procedure 23 ..... 2, 20
Federal Rule of Civil Procedure 23(e) 17
Federal Rule of Civil Procedure 23(f) .. 2, 4-5, 9, 13-16 20-22
Federal Rule of Civil Procedure 41(a) 3, 4, 21
Federal Rule of Civil Procedure 41(a)(1) 7, 16
Federal Rule of Civil Procedure 41(a)(2) 9
Federal Rule of Civil Procedure 66 17
Supreme Court Rule 37.3 1
Supreme Court Rule 37.6 1

Statutes

28 U.S.C. § 1291 ..... 4, 8, 18, 19, 21
28 U.S.C. § 1292 18
28 U.S.C. § 1292(b) 2, 18
28 U.S.C. § 1292(e) 20
31 U.S.C. § 3730(b)(1) 17
42 U.S.C. § 1983 10
False Claims Act 17

Miscellaneous

5 Moore, Federal Practice P41.05 (2d ed. 1951) 17
Advisory Committee Notes to 1998 Amendments, Subdivision (f) 2, 20

Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96) 15

Barry Sullivan & Amy Kobeleski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008) 14

Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal For A New Guideline*, COLUM. BUS. L. REV. 231, 232 (2004) 14

Henry J. Friendly, *Federal Jurisdiction: A General View*, 120 (1973) 16

Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. App. Prac. & Process, 309, 312 (1999) 14

Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 MO. L. REV. 207, 208 (Winter 2010) 16

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) 15

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291-92 (2002) 15

S. REP. NO. 109-15, 17 2021 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21 16

Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?* 81 NOTRE DAME L. REV. 591, 647 (2006) *15

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – The Voice of the Defense Bar, is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. See http://www.dri.org/About. To promote these objectives, DRI participates as amicus curiae in cases that raise issues important to its membership, their clients, and the judicial system. See, e.g., *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Air Wisconsin Airlines Corp v. Hoeper*, 134 S. Ct. 852 (2014); *Heimeshoff v. Hartford Life Acc. Ins. Co.*, 134 S. Ct. 604 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). This is one of those cases.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties has consented to this filing.

DRI has a strong interest in ensuring that the rules of civil procedure are consistently and fairly enforced in order to provide a fair and balanced civil justice system rather than circumvented - as demonstrated in this case – where class plaintiffs who were unsuccessful in seeking Rule 23(f) interlocutory review voluntarily dismiss their case with prejudice in order to manufacture finality for purposes of forcing the appellate court to consider the class certification decision at the outset. This tactic is not available to defendants when class certification is granted, and thus results in a one-way avenue for an appeal. And equally problematic, it allows appeals from decisions that fail the test for interlocutory review under Rule 23(f) and 28 U.S.C. § 1292(b). Thus, the Ninth Circuit's decision directly affects the fair, efficient, and consistent functioning of our civil justice system. As such, it is of vital interest to the members of DRI.

When proposed classes fail to satisfy the generally applicable requirements of Federal Rule of Civil Procedure 23 for adjudicating the claims of many different persons at once, class certification is denied. Plaintiffs can then petition "for *permission*" to appeal the adverse class certification decision under Rule 23(f), which grants the appellate courts discretion in determining whether to grant interlocutory appellate review of a district court order granting or denying certification. Advisory Committee Note (1998); *Dalton v. Lee Publications, Inc.*, 625 F.3d 1220, 1221 (Judge O'Scannlain, dissenting) (9th Cir. 2010).

DRI has a unique vantage point to help this Court understand the importance of proper adherence to the outer bounds of the appellate courts' jurisdiction over class certification decisions, not only from a legal standpoint, but also from practical and economic standpoints as well. DRI's members regularly must defend their clients against class suits in a wide variety of contexts. Accordingly, DRI, alone and in conjunction with other legal organizations, has conducted seminars studying these lawsuits long before this case. DRI has also compiled a Class Action Compendium designed to provide civil defense lawyers and corporate counsel with an understanding of the intricacies of class action practice and procedure. These and other seminars and writings on class action litigation reveal DRI's longstanding interest in mass action litigation. DRI has also submitted testimony regarding the federal rules of civil procedure, potential legislation relating to class actions, and other issues arising from class action litigation.

Based on its members' extensive practical experience, DRI is uniquely suited to explain why the better approach is to adopt a rule that does not permit a plaintiff to manufacture appellate jurisdiction to review a class-certification denial by the stratagem of voluntarily dismissing all claims only to revive them if the appeal is successful.

SUMMARY OF THE ARGUMENT

The decision below implicates the effect of a voluntary dismissal with prejudice. When used appropriately, a voluntary dismissal with prejudice under Federal Rule of Civil Procedure 41(a) can

streamline litigation, allowing plaintiffs to forgo weak claims in order to make the judgment final and thus obtain immediate review of the retained claims. The trade-off for this stratagem is the inability to revive the dismissed claims. But while a voluntary dismissal with prejudice is ordinarily understood to result in the discharge of those claims "forever", respondents use it here simply to manufacture appellate jurisdiction to obtain review of an interlocutory order, with an open avenue to revive those dismissed claims at a later date. The Ninth Circuit's allowance of this tactic reflects a grave misunderstanding of the nature of a dismissal with prejudice. Not only does this tactic infringe on the final judgment rule, 28 U.S.C. § 1291, and call into question whether the plaintiffs are "aggrieved," it also promotes piecemeal appeals, especially when one considers how plaintiffs could use this tactic to obtain review of the many interlocutory orders entered in the typical case outside the class action context.

Moreover, the "maneuver" permitted by the Ninth Circuit benefits plaintiffs only. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). There is no analogous Rule 41(a) option available to defendants. However, the class certification issue is equally important to plaintiffs *and* defendants. *Id.* The Ninth Circuit's decision therefore provides class plaintiffs a procedural advantage, distorting the balance of the civil justice system and the court's attempt to maintain that balance through the enactment of Federal Rule of Civil Procedure 23(f) – which places plaintiffs and defendants on equal footing by giving the courts of appeals the discretion to permit an immediate appeal of a class certification

decision. The Ninth Circuit's decision completely eviscerates that discretion by placing class plaintiffs in the driver's seat and allowing them, and not the judiciary, to determine when to take an immediate appeal of a class certification denial. This runs directly afoul of the legislative intent of Rule 23(f), which was to make interlocutory appeals "the exception rather than the rule." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

If the Ninth Circuit's decision is left to stand, the clients that DRI's members regularly defend will face a number of hard, unfair choices. Defendants will be forced to settle once a class pursues this strategy, or defend a full-fledged appeal of the class certification decision which does not even begin to address the merits of the claims. The possibility of reversal of the district court's denial of class certification may also improperly inflate the value of the case, creating a "blackmail" settlement. Careful adherence to Rule 23(f) guards against these ills by creating a balance that permits interlocutory appellate review of class certification decisions but only when the court of appeals determines that an immediate appeal is appropriate.

For these reasons, DRI urges this Court to reverse the Ninth Circuit's decision.

ARGUMENT

I A Tactic That Allows Plaintiffs To Manufacture Interlocutory Appellate Jurisdiction To Obtain Review Of A Class-Certification Denial - And To Do So By Employing Voluntary Dismissal Tactics Without Consequence – Ignores The Effect Of A Dismissal With Prejudice, Runs Directly Afoul Of The Discretion Given To The Appellate Courts To Hear Interlocutory Certification Appeals, And Distorts The Balance Of The Civil Justice System.

A. When A Plaintiff Makes The Strategic Decision To Voluntarily Dismiss Part Or All Of His Claims With Prejudice In Order To Achieve Finality And Take An Immediate Appeal, He Cannot Revive The Dismissed Claims.

The Ninth Circuit decision essentially allows plaintiffs to manufacture finality and force an immediate appeal of an order denying class certification simply by voluntarily dismissing their claims with prejudice. The very core of the Ninth Circuit's position "reflects a fundamental misunderstanding of the nature of a dismissal with prejudice." *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 247 (3d Cir. 2013). Once a plaintiff voluntarily dismisses his or her claims with prejudice, those claims "are gone forever" – in other words, "not reviewable" by the appellate court and not permitted to be "recaptured at the district court level." *Id.*, citing *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009) and *Dannenberg v. Software*

Toolworks, 16 F.3d 1073, 1077 (9th Cir. 1994). This comports with the rule that a party must be "aggrieved" by a district court judgment or order in order to have standing to appeal. *U.S. v. Windsor*, 133 S. Ct. 2675, 2687 (2013). In its simplest terms, appellate review is reserved for a losing party seeking reversal of an adverse decision. It is not intended to be used by a plaintiff who has gripes with an interlocutory ruling but nonetheless agrees to dismiss his own case with prejudice. In that situation, the plaintiff is no longer an "aggrieved party" entitled to obtain appellate review.

Parties regularly dismiss counts of a complaint, theories of the case, or entire complaints on a voluntary basis. Federal Rule of Civil Procedure 41(a)(1) allows for this. But the traditional understanding is that once a plaintiff has done so, those claims are gone forever. This is the "gamble" litigants take "when they ask a district court to dismiss live claims with prejudice so they can pursue an immediate appeal...[the plaintiff] must live with the consequences of the final judgment it requested." *International Marketing, Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724,733 (7th Cir. 1999). In short, a litigant cannot have his cake and eat it too.

This conundrum can arise in several different contexts. A plaintiff may decide to dismiss all claims with prejudice to allow an immediate appeal even if the trial court dismissed the complaint in its entirety but granted leave to amend some of the allegations. This was the factual scenario in *International Marketing*. The Seventh Circuit succinctly noted that this strategic decision –"necessary to secure appellate

jurisdiction under 28 U.S.C. § 1291" – is not without consequence:

> Of course, a final judgment is just that. [The plaintiff's] strategic decision meant that its case can be resuscitated only if it is able to convince this court that it had in fact properly stated one or more of its claims, in the form they took before the district court in the unamended complaint. Taking an immediate appeal was thus a calculated risk, at least if [the plaintiff] thought that some of the less favored claims were nonetheless salvageable by amendment. But this is the way [the plaintiff] chose to litigate[.]

Id. at 727.

Another, more typical scenario involves a plaintiff's conscious decision to abandon one claim in order to obtain finality and appellate review of an adverse decision on another claim. In this case, "if plaintiff loses on A and abandons B in order to make the judgment final and thus obtain immediate review, the court will consider A, but B is lost forever." *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009). The Second Circuit's decision in *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90 (2d Cir. 1987), neatly illustrates this principle. In *Empire Volkswagen*, the district court granted summary judgment against plaintiff on some of its theories, entering an order that also resolved some of the issues on the theories that remained open for trial. *Id.* at 93-94. Concluding that the remaining theories were "unduly limited" by the district court's order such that there was insufficient

evidence to proceed to trial, the plaintiff sought and obtained an order dismissing all of the remaining claims and granting the defendant's counterclaims, pursuant to Rule 41(a)(2). *Id.* However, while this tactic permitted the plaintiff to secure review of the matters actually decided on the motion for summary judgment, the *Empire Volkswagen* Court held that matters that had remained open for trial and were resolved only by the voluntary dismissal were abandoned. In the Second Circuit's view, nothing "justif[ied] deviation from the general rule that an appeal from a judgment entered upon a voluntary dismissal with prejudice does not bring up for review any matters that were voluntarily dismissed." *Id.* at 94. In so ruling, the Second Circuit noted that this case well-illustrated "[t]he danger inherent in electing voluntarily to dismiss a case because of a prior adverse ruling[.]" *Id.* at 95. The trade-off for the right of immediate appeal of a partial summary judgment order is clear: the litigant loses any and all claims not resolved by the court but voluntarily dismissed at the litigant's request.

Here, the district court's denial of class certification had nothing do with the merits of Respondents' claims. Yet Respondents made the calculated decision to voluntarily dismiss the entirety of their claims with prejudice in an effort to manufacture finality and force immediate appellate review of the class certification decision (having first been unsuccessful in obtaining interlocutory appellate review under Rule 23(f)). Under the principles discussed above, Respondents cannot "revive" their now-dismissed individual claims on remand, as they contend they may do if successful on

appeal. Br. in Opp. 16, n. 4. This would completely undermine the traditional understanding of a voluntary dismissal with prejudice and allow plaintiffs to act without consequence and dismiss and revive their claims at will.

If such a tactic were permitted in the class action context, it would certainly be used by plaintiffs in a multitude of other contexts as well. As the Third Circuit aptly noted, if courts "were to allow such a procedural sleight-of-hand to bring about finality," then "nothing [would] prevent [plaintiffs] from employing such a tactic to obtain review of discretionary orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits" of the case. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-46 (3d Cir. 2013). Absent a reversal, the Third Circuit's fear would be realized. Take, for example, a motion in limine filed by the defendant in a 42 U.S.C. § 1983 action to preclude an expert's testimony and granted by the district court. Under the tactic allowed by the Ninth Circuit, nothing would prevent the unsatisfied plaintiff from voluntarily dismissing the entirety of her claims with prejudice - even though the motion in limine did not reach the merits of the case - simply to obtain an immediate appeal and only to argue that the dismissed claims are revived on remand. The number of interlocutory orders entered in the typical case underscores the many piecemeal appeals that could occur if plaintiffs are able to use such a strategy without consequence.

Moreover, if this tactic were to be allowed, it would dramatically alter the careful balance of

available appeals that is embodied in the rules, both those governing civil procedure at the district court level and those governing appellate jurisdiction. Currently, the general rule is that an appeal as a matter of right occurs only after a final judgment. Carefully drawn exceptions exist as a matter of statute and court rule or their interpretation in doctrines such as the *Cohen* collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-546 (1949). But these limits would be jeopardized if the Ninth Circuit's decision is upheld.

The Ninth Circuit's rule might also have consequences in the circumstances of removal and remand jurisdiction. It is not uncommon for defendants to seek and obtain the plaintiff's voluntary dismissal of federal claims in exchange for a remand that allows the plaintiff to litigate in the state court forum he initially chose. If voluntary dismissal is deemed to be subject to revocation on remand, what is there to stop a plaintiff from voluntarily dismissing federal claims, only to revive them down the road should the state court forum not prove to be as favorable as the plaintiff initially believed? This could either result in protracted litigation through two court systems or discourage defendants from making the initial agreement to pursue only the state claims in the state court.

The use of voluntary dismissals can achieve a salutary result in many cases; but the Ninth Circuit decision threatens its proper use. A rule that allows a plaintiff to manufacture finality by abandoning all remaining parts of his case, but which also forbids any attempt to recapture the abandoned claims, is an

efficient and proper use of the voluntary dismissal mechanism. If the court of appeals affirms, there is no need for a trial as the case is concluded. If the district court's ruling is reversed, the resultant trial on remaining theories will likely be more efficient. *Id.* However, allowing an appeal to proceed as the Ninth Circuit's decision does will undermine the rule of law, cause grave confusion to litigants trying to resolve and terminate litigation as to some theories or issues, and result in increased appellate litigation asking courts to overturn dismissals entered into by agreement.

B. The Ninth Circuit's Decision Inures Only To The Benefit Of Class Plaintiffs, Thus Distorting The Balance Of The Civil Justice System And Placing Unfair Pressures On Defendants.

The practical ramifications of the Ninth Circuit's decision on the businesses and individuals DRI's members regularly defend in class suits support the Court's reversal. The decision below turns class action rules on their head and imposes economic and other improper strains on defendants. It does so in two major ways:

First, the Ninth Circuit's decision creates a one way-street which "operates only in favor of plaintiffs[.]" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). It is well-settled that only plaintiffs can opt to voluntarily dismiss their cases under Rule 41(a). Defendants have no such right; they can only be dismissed by the plaintiff or the court. However, the certification issue "will often be of critical importance to defendants as well." *Id.* In short,

"[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle the case and to abandon a meritorious defense." *Id.* Accordingly, the Ninth Circuit's decision gives class plaintiffs a procedural "leg up" in that it allows them to immediately appeal an order denying class certification, but disallows defendants from immediately appealing an order certifying a class unless the court of appeals exercises its discretion under Rule 23(f) to consider the appeal on an interlocutory basis.

The fairer rule, and the one DRI urges this Court to adopt, is that both plaintiffs *and* defendants seeking review of a class certification decision before entry of a final judgment must proceed under Rule 23(f). If the court of appeals declines to exercise its discretionary jurisdiction under Rule 23(f), then there will be no appellate review of the certification decision – at least not until the district court issues a final decision. This puts class plaintiffs and defendants on a level playing field and restores the equity component built into Rule 23(f), which allows appeals "from an order granting *or* denying class-action certification under this rule..." Federal Rule of Civil Procedure 23(f) (emphasis added). Of course, litigants may propose revisions to Rule 23(f) through the rule-making process to provide for an automatic appeal of a certification decision, whether it is granted or denied, which would provide the same even-handed approach to the appeal of a decision regarding certification.

Second, the realized threat of not one, but two bites at the proverbial appellate apple (exemplified here, where Respondents first sought and were denied interlocutory appellate review under Rule 23(f) and then voluntarily dismissed their claims with prejudice and took an appeal) will force defendants into high-dollar settlements even if a meritorious defense exists. Even in the ordinary course, the grant or denial of a motion for class certification is a defining moment in the class action. Barry Sullivan & Amy Kobeleski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008) ("Arguably, the most critical stage in a class action is the point at which the court decides whether to certify the class."); Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal For A New Guideline*, COLUM. BUS. L. REV. 231, 232 (2004) ("A court's decision whether to certify a class is often the decisive moment in a class action...."); KENNETH S. GOULD, 1 J. APP. PRAC. & PROCESS, 309, 312 (1999) ("The decision is often crucial....[it] can have a life or death impact on the course of class action litigation...."); *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) ("the unwieldiness, the delay, and the danger that class treatment would expose the defendant or defendants to settlement-forcing risk are not costs worth incurring."). The certification decision becomes even more significant and protracted in light of the Ninth Circuit's allowance of an immediate appeal from an order denying class treatment. Thus, even if the district court denies class certification and the court of appeals denies the

plaintiffs' request for review under Rule 23(f), the tactic permitted by the Ninth Circuit will require defendants to spend considerable resources to defend a full-fledged appeal of the class certification decision before even beginning to litigate the merits of the claims.

This will place intense pressure on defendants to settle, even if an adverse judgment ultimately seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). It is common knowledge that "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291-92 (2002) ("[E]mpirical studies ... confirm what most class action lawyers know to be true."); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R. *15 Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?* 81 NOTRE DAME L. REV. 591, 647 (2006) ("[A]lmost all certified class actions settle."). Even where the district court denies class certification and the court of appeals declines to review that decision under Rule 23(f), the threat of defending an additional appeal may tip the scales towards

settlement. If allowed to stand, the Ninth Circuit's decision will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). Simply put, "[s]uch leverage can essentially force corporate defendants to pay ransom..." S. REP. NO. 109-15, 17 2021 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 MO. L. REV. 207, 208 (Winter 2010).

Careful adherence to the finality requirement and Rule 23(f) serves to guard against the ills set forth above. Appeals of class certification decisions brought after exhaustion of Rule 23(f)'s remedy using the mechanism of a voluntary dismissal harm the civil justice system, both because they create enormous litigation costs with no attendant benefit and because the appeals destabilize the carefully-calibrated equilibrium the rules were designed to create. They also foster inefficiency by allowing "piecemeal appeal disposition[,]" which in turn creates a "debilitating effect on judicial administration[.]" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). And, as discussed above, the strain this places on the individuals and businesses that DRI's members are regularly called on to defend cannot be overstated.

This will turn the concept of voluntary dismissal on its head and require increased court intervention. Already, in some contexts– including if a class has

been certified – court approval is required for a voluntary dismissal under Rule 41(a)(1). See, e.g., Federal Rule of Civil Procedure 23(e) (requiring court approval for voluntary dismissal of "[t]he claims, issues, or defenses of a certified class"); Federal Rule of Civil Procedure 66 (requiring a court order to dismiss any action in which a receiver has been appointed); 31 U.S.C. § 3730(b)(1) (plaintiffs cannot dismiss an action brought under the False Claims Act unless "the court and the Attorney General give written consent to the dismissal and their reasons for consenting."). The primary purpose of requiring a court order in such circumstances is "to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Alamance Indus., Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961), citing 5 MOORE, FEDERAL PRACTICE P41.05 (2d ed. 1951). Stated another way, while the voluntary dismissal mechanism serves laudable goals – including saving the courts and parties time and money and aiding in the efficient operation of the civil justice system – it can undermine the legal system if used as a tool to obtain an appeal of a non-final issue that was decided prior to the agreement to voluntarily dismiss the case. This is precisely what the Ninth Circuit's decision threatens to accomplish.

C. The Discretion To Immediately Review A Non-Final Certification Decision Belongs To The Appellate Courts, Not Class Plaintiffs.

Federal appellate jurisdiction generally depends on the existence of a *final* decision "which ends the

litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Catlin v. United States*, 324 U.S. 229, 233 (1945). The finality requirement serves an important purpose: preventing "the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

The courts of appeals are statutorily granted jurisdiction to consider appeals "from all final decisions" of the district courts. 28 U.S.C. § 1291. Because "the finality requirement embodied in § 1291 is jurisdictional in nature[,i]f the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). Limited statutory exceptions to the finality requirement, set forth in 28 U.S.C. § 1292, are typically inapplicable to orders denying class certification, except in the rare case where the district court determines that the order involves a "controlling question of law as to which there is substantial ground for difference of opinion," in which case the courts of appeals have discretion to permit an interlocutory appeal. 28 U.S.C. § 1292(b). This is because "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim." *Livesay*, 437 U.S. at 467.

In *Livesay*, the Court held that "orders relating to class certification are not independently

appealable under § 1291 prior to judgment" – even if the prejudgment order denying class certification would sound the "death knell" of the class action. *Id.* at 470. The "death knell" doctrine "assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Id.* at 469-70. Writing for a unanimous Court, Justice Stevens rejected the death knell doctrine as a means to manufacture finality, announcing that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id.* at 477. In so doing, the *Livesay* Court recognized that the "death knell" doctrine creates a one-way street for plaintiffs to obtain appellate jurisdiction of prejudgment orders denying class certification:

> First, the doctrine operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well. Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory. Whatever similarities or differences there are between plaintiffs and defendants in this

> context involve questions of policy for Congress.

Id. at 476. The Court was therefore mindful that any "choice" concerning whether to extend or reduce jurisdiction "falls in the legislative domain." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), *overruled other gds, Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

After *Livesay*, Congress enacted 28 U.S.C. § 1292(e), which authorized the Supreme Court to "prescribe rules...to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for...." The Supreme Court's response in the class action context was to adopt Federal Rule of Civil Procedure 23(f), which authorizes a court of appeals to permit a timely "appeal from an order granting or denying class-action certification[.]" Federal Rule of Civil Procedure 23(f). *Id.* The Advisory Committee Notes to Rule 23(f) make clear that the drafters intended the courts of appeals to enjoy discretion to grant or deny permission to appeal "based on any consideration the court of appeals finds persuasive." Federal Rule of Civil Procedure 23, Advisory Committee Notes to 1998 Amendments, Subdivision (f).

The Ninth Circuit's decision runs directly afoul of Rule 23(f) and the discretion given to the courts of appeals to grant or deny interlocutory review of class certification orders. As the Ninth Circuit itself has observed, "the drafters [of Rule 23(f)] intended interlocutory appeal to be the exception rather than the rule." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). But the Ninth Circuit's

decision directly contradicts its prior recognition that "petitions for Rule 23(f) review should be granted sparingly." *Id.* Perhaps best explained in *Livesay*, the Ninth Circuit's decision "thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule-'that of maintaining the appropriate relationship between the respective courts. . . [a] goal, in the absence of most compelling reasons to the contrary... very much worth preserving.'" *Livesay*, 437 U.S. at 476, quoting *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 654 (2d Cir. 1975). The rule adopted by the Ninth Circuit completely erodes this balance by permitting non-final decisions to act as final decisions through strategic appeal tactics – tactics rejected by this Court. 437 U.S. at 476-77.

In short, the Ninth Circuit's ruling in this case distorts the carefully-calibrated balance of Rule 23(f) by eliminating all discretion granted to the courts of appeals to determine those select class certification decisions that warrant interlocutory review. It does so by allowing plaintiffs to invoke the voluntary dismissal rule, Federal Rule of Civil Procedure 41(a), to "manufacture" finality by stipulating to dismiss their claims with prejudice and forcing an appeal of the class certification decision. *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015). In the Ninth Circuit's view, plaintiffs can invoke the court of appeals' jurisdiction under § 1291 "because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse – and thus appealable – final decision." *Id.* at 612, quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065 (9th Cir. 2014). The

Ninth Circuit's decision makes no attempt to limit the circumstances under which plaintiffs can force jurisdiction upon the appellate court, even though the plaintiffs in that case were previously unsuccessful in seeking interlocutory appellate review under Rule 23(f). *Baker*, *supra*, at 611.

Nor does the Ninth Circuit explain how a party which voluntarily agrees to dismiss its claims with prejudice can be aggrieved. Once this principle is adopted, there is no end to the circumstances in which appellate interlocutory jurisdiction may be manufactured. If left to stand, appellate courts will no longer control their discretionary jurisdiction because the plaintiffs will be able to achieve interlocutory review by this stratagem.

The Ninth Circuit's decision creates grave problems in the effectuation of current rules governing interlocutory jurisdiction, voluntary dismissals, and aggrieved parties. It conflicts with longstanding notions of each of these concepts. And it poses the risk of severe practical problems. For these reasons, a reversal is in order.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

LAURA E. PROCTOR
President of
DRI— The Voice
of the Defense Bar
55 W. Monroe St.
Suite 2000
CHICAGO, IL 60603

MARY MASSARON
Counsel of Record
HILARY A. BALLENTINE
PLUNKETT COONEY
38505 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4000
mmassaron@plunkettcooney.com

Counsel for Amicus Curiae DRI – The Voice of the Defense Bar

March 17, 2016